IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA 385 of 1995.

Date of decision 27.4.2007.

Manna ….**Appellant.**

Versus

State of H.P. ……**Respondents.**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud, J.

Whether approved for reporting?[1]

For the appellant:	**Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.**
For the Respondent	**Mr. M.S.Chandel, Advocate General, with Mr. Virender Verma, Addl. AG.**

Dev Darshan Sud, J. (Oral).

Plaintiff has preferred this appeal against the judgment and decree of the learned District Judge dismissing the appeal preferred by the plaintiff-appellant against the order of the learned Sub Judge

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[1] *Whether reports of Local Papers may be allowed to see the judgment?*

Ist Class (II), Rohru, Distt. Shimla, HP, whereby the suit for declaration filed by him has been dismissed.

Proceedings under Section 163 of the Himachal Pradesh Land Revenue Act were initiated by the revenue authorities against the appellant-plaintiff for encroaching on government land. Appellant was held to be an encroacher and an order of eviction was passed by the Assistant Collector IInd Grade. The appellant filed a suit for declaration in the Court of Sub Judge Ist Class (II), Rohru on the plea that he is an agriculturist by profession and the land in dispute has been occupied by the predecessor in interest of the appellant from generation to generation. Land in khasra No. 79/163 min Kh. No. 4/1, measuring 0-13-19 hectares was in possession of his ancestors and now he is in peaceful cultivating possession. He alleged that entries in the revenue record showing the ownership of the State are wrong and that he has become owner of the land by way of adverse possession. It was pleaded that the order of the Assistant Collector IInd Grade, Rohru dated 17.2.1989 ordering his eviction is illegal and

without jurisdiction. The learned trial Court, considering the totality of evidence on record, dismissed the suit holding that the order passed by the Collector was legal, the plaintiff had not been able to establish his adverse possession and had no enforceable cause of action. An appeal preferred before the District Judge also met with the same fate.

This appeal was admitted by this Court on 12.1.1996 on the following substantial question of law:

> **"Whether the Courts below have misread and misinterpreted the oral and documentary evidence on record to come to the conclusion that the possession of the appellant/plaintiff is not in the nature of adverse possession and has not matured in his ownership."**

When the appeal was taken up for hearing, learned counsel for the appellant has urged that another substantial question of law not included in the memo of appeal but which arises from the pleadings on record was required to be considered by this Court. Learned

counsel submits that in terms of proviso to Section 100 (5), substantial question of law may be formulated to the following effect:

1. **Whether the demarcation of the land has been carried out in accordance with Section 107 of the Himachal Pradesh Land Revenue Act or not and its effect?**

I have heard the learned counsel for the parties and gone through the record.

The question sought to be urged by the appellant arises from the material on record as the tatima (spot map) which has been prepared to show the purported encroachment has not been prepared by a revenue officer as contemplated by Section 107 ibid.

Learned counsel has made submissions on the two questions of law arising for the consideration of this Court. On the question of adverse possession, I am not satisfied that the record establishes the nature of possession of the appellant as being adverse to that of the State. Both the learned Courts below have

considered in detail the contention raised by the appellant and considered the evidence in detail. In the second appeal, it is not open to me to reappreciate the evidence. I have gone through the evidence and the documents on record and find that the appellant has not been able to establish his adverse possession for 30 years of more. He has also not been able to dislodge the findings of the learned two Courts below on this issue. I accordingly hold that the contention of the appellant with respect to adverse possession is not established on the facts on record. This submission is, therefore, rejected.

The Hon'ble Supreme Court in <u>State of Rajasthan v. Harphool Singh (dead) through his LRs</u> (2000) 5 SCC 652) has held as under:

> **" 12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable**

property and conferring upon a third-party encroacher title where he had none. The decision in *P. Lakshmi Reddy. V. L.Lakshmi Reddy (AIR 1957 SC 314)* adverted to the ordinary classical requirement – that it should be *nec vi, nec clam, nec precario* – that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus. In the decision reported in *Secy. Of State for India in Council v. Debendra Lal Khan (1933) 61 IA 78)* strongly relied on for the respondents, the Court laid down further that it is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running, ought if he exercises due vigilance to be aware of what is happening and if the rights of the Crown have been openly

> **usurped it cannot be heard to plead that the fact was not brought to its notice. In *Annasaheb Bapusaheb Patil v. Balwant (1955) 2 SCC 543,* it was observed that a claim of adverse possession being a hostile assertion involving expressly or impliedly in denial of title of the true owner, the burden is always on the person who asserts such a claim to prove by clear and unequivocal evidence that his possession was hostile to the real owner and in deciding such claim, the courts must have regard to the animus of the person doing those acts."**

Applying the principles to the present case, the appellant –plaintiff has not been able to establish his claim in a clear and cogent manner. Neither the factors necessary as a condition precedent nor the requisite time for perfecting title has been established on record.

Learned Additional Advocate General submits that the findings of the two Courts below cannot be varied or altered in second appeal. He has cited a number of judgments on the point. It is well settled

that concurrent findings of fact cannot be interfered with under Section 100 of the Code of Civil Procedure in second appeal. I find nothing from record which shows or establishes that the findings arrived at are perverse or that the evidence on record does not lead to the conclusion that the claim of the plaintiff is not established.

Learned counsel for the appellant submits that there has been no proper demarcation of the land and, therefore, the entire proceedings should fail. He has referred to Section 107 of the H.P. Land Revenue Act (hereinafter referred to as the Act) which vests power in the revenue officer for the purposes of making a demarcation. Learned counsel places reliance on the judgment of this Court in Radha Swami Beas V. State of H.P. (HP ILR 1984 HP 307), holding that demarcation of boundaries under Section 107(1) of the Act is a quasi judicial and statutory function which is exercisable by the Assistant Collector IInd Grade. He also places reliance on a judgment of the Hon'ble Supreme Court in State of H.P. and others v. Mangat Ram & others (AIR

1995 SC 665) to the effect that under the Act, it is the Assistant Collector IInd Grade who is authorized to give demarcation. Their Lordships have held as under:

> **" 14. On a careful consideration of the above, we are not in a position to differ from the High Court in relation to its finding that the report of the Assistant Collector II Grade is final. The Assistant Collector Grade II is the competent person to effect demarcation. His report is final. Section 107 of the Revenue Act reads as under:**
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> > **"107. Power of Revenue Officers to define boundaries.- (1) A Revenue Officer may, for the purpose of framing any record of making any assessment under this Act or on the application of any person interested, define the limits of any estate, or of any holding, field or other portion of an estate, and may, for the purpose of indicating those limits, require survey marks to be erected or repaired."**

To similar effect is the judgment of this Court in Kamal Dev and another v. Hans Raj (AIR 2000 HP 130).

Para 13 of the judgment is relevant which is reproduced as under:

> **"13. Be it stated that demarcation of boundaries of a holding, field or any other portion of an estate is a statutory function of quasi judicial nature of the Revenue Officer and the above instructions, in view of their adoption for Himachal Pradesh, evidently to fulfil the requirements of Section 106 of the H.P. Land Revenue Act, have statutory sanction. Therefore, it is necessary for a Revenue Officer to discharge his function of demarcation of land in accordance with the said instructions"**

Submission of the learned counsel for the appellant is that in the circumstances, the entire proceedings be held to be without jurisdiction. This submission cannot be accepted in its totality. After the passing of the order by the Assistant Collector IInd Grade who, at the relevant time, was exercising the powers under Section 163 of the Act, it was the petitioner – appellant who as a plaintiff had approached the trial Court with a specific case that a

particular khasra was in his possession and that he was the owner of such land by way of adverse possession. It was this contention of the appellant which was negatived by the trial Court as also by the appellate Court. However, as an adjunct to the submission, the holding of the appellant claimed by him to be in his adverse possession and otherwise claimed by the State as its ownership has to be identified. In the circumstances, for the purposes of enforcing the judgment and decree of the two Courts, it would be for the State to carry out the necessary demarcation of the area as described by khasra numbers for which proceedings under Section 163 had been initiated by the respondents and which was the subject matter of the suit. Till and so long such identification by demarcation is not made by following the procedure prescribed under Section 107 of the Act, the appellant will not be evicted from the land in dispute.

The appeal is, therefore, partly accepted to this extent only. There shall be no order as to costs.

April 27, 2007(PC). (Dev Darshan Sud), J.